IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/10/2002

CORAM

THE HON'BLE MR. JUSTICE R.JAYASIMHA BABU
AND
THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

L.P.A No.212 of 1999

M/s New India Assurance Co. Ltd.,
Nagpur, Homi House Branch,
Nagpur. .. Appellant

-Vs-

1.Sugandha Balakrishna Rode
2.Bharathi Rode
3.Arti Rode
4.Kirthi Rode

(RR 2 to 4 declared Major and Guardian
discharged vide order dated 23.10.2002
in CMP Nos.15436 to 15438 of 2002) .. Respondents

Appeal against the judgment dated 2.2.1999 made in C.M.A.No.573 of 1
991 passed by the learned Single Judge.

!For Appellant : Mr.K.S.Narasimhan

^For RR 1 to 4 : Mrs.Uma Ramanathan

:J U D G M E N T
(Judgment of the Court was delivered by R.JAYASIMHA BABU,J)

This appeal is by the insurer who complains that the learned Single Judge ought not to have entertained an appeal filed by the claimants who sought enhancement, as they had not impleaded the owner and the driver both of whom had remained ex parte before the Tribunal. Counsel for the insurer submits that the role of the insurer is only that of discharging the liability which the insured had incurred and unless the liability of the insured is determined in his presence, the insurer cannot be held liable.

2. He relied on the decision of the Apex Court in the case of Oriental Insurance Co. Ltd. -vs- Sunita Rathi (1998 ACJ 121) wherein it was observed that the liability of the insurer arises only when the liability of the insurer has been upheld for the purpose of indemnifying the insured under

the contract of insurance.

3. We have no doubt about the proposition that the insurer takes on the liability that the insured has incurred and if the insured has not incurred a liability, there will be no liability on the insurer. Before the Tribunal, all the necessary parties were arrayed; the owner, the driver, besides the insurer. Adjudication took place after giving opportunity to the owner and the driver to rebut the claim that had been made. They chose not to utillise that opportunity, but remained ex parte.

4. The finding recorded by the Tribunal that the owner was vicariously liable for the negligent act of his driver has become final. The amount of compensation payable to the claimants was a matter to be decided by the Tribunal. The evidence in support of the claim had been placed before it by the claimants. The owner did not dispute the correctness of the claim, did not question the reliability of the evidence tendered or it's sufficiency. The judgment rendered on the basis of that evidence was the result of the assessment by the Tribunal based on which the amount of compensation was to be determined. The insurer, as is now well settled, has no role to play in the matter of determining the liability vis-a-vis the owner, nor did the insurer have any role to play vis-a-vis the quantum of damages or compensation that the owner had to pay as a consequence of the negligent act of his driver.

5. All though in the normal course, the owner should have been made a party, having regard to the fact that the owner had remained ex parte, the appeal had been filed by the claimants only against the insurer. The insurer was made a party obviously to ensure that any increase in the award would be enforceable against the insurer as under Section 149 of the Motor Vehicles Act, the claimants have a right to enforce the award and recover the same from the insurer once the liability of the owner has been established.

6. The absence of the owner in the array of parties in the appeal that had been filed by the appellant, in the circumstances, cannot be regarded as rendering the appeal itself as not being maintainable or being liable to be dismissed in limine.

7. Counsel for the claimants placed reliance on the judgment of the Supreme Court in the case of A.Robert -vs- United Insurance Co. Ltd. (AIR 1999 SC 2977). That case was an appeal by the claimants who had sought enhancement of the compensation awarded. Though they had initially impleaded the owner as a party, the owner's name was subsequently deleted and even the Special Leave Petition as against that owner was dismissed by the Supreme Court as service of notice was not effected on the owner. The Court nevertheless proceeded to consider the appeal as against the insurer, the other party to the appeal. At the time of consideration of the appeal against the insurer, it was only the insurer who was before the Court and the owner was not even on record. The Court proceeded to consider the evidence and enhanced the amount of compensation, but limited the liability of the insurer to the amount up to which it had assumed liability in terms of the policy. Thus, the enhancement of the liability of the owner was effected by the Apex

Court in the absence of the owner and in the presence of the insurer alone. The facts of the case with which we are now concerned are quite similar to the position that prevailed in the case on which the respondents' counsel places reliance.

8. The learned Single Judge therefore was right in entertaining the appeal and in proceeding to consider the evidence on the basis of which he has enhanced the amount of compensation. The presence of the owner in the array of parties would have made no difference whatever as, the owner had not even contested the claim before the Tribunal, but had remained ex parte and could have remained exparte the appeal as well. We therefore do not find any justification for interfering with the judgment of the learned Single Judge. The appeal is dismissed. CMP 20089 of 1999 is closed.

Index : Yes
Internet: Yes
sv

To

1.The Manager, New India Insurance Co. Ltd., Nagpur Homi House Branch, Nagpur.

2.The Motor Accident Claims Tribunal (Subordinate Judge) Tuticorin.

3.The Record Keeper, VR Section, High Court, Madras,